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SELF-DEFENSE AND THE PSYCHOTIC AGGRESSOR

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Can one justifiably kill a faultless, insane assailant to save oneself or another from imminent and serious harm? Although scholars on both sides of the Atlantic agree that the person attacked should not be punished for defending herself from the psychotic aggressor, there is significant disagreement with regards to whether the defensive response should be considered justified or merely excused. Furthermore, amongst those who argue that the appropriate defense in such cases is a justification, there is disagreement regarding whether the specific ground of acquittal should be self-defense or necessity.

I. THE PROBLEM

The hypothetical case of the psychotic aggressor was first put forth by one of us more than 35 years ago:

Imagine your companion in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposively in the sense that he rationally relies on means that further his aggressive end. He does not act in a frenzy or in a fit, yet it is clear his conduct is nonresponsible. If he were brought to trial for his attack, he would have a valid defense of insanity.

In general form, the problem is whether force may be justifiably exerted against excused but unjustified aggression. More specifically, there are two basic questions posed by the case of the psychotic aggressor. First, if the victim of the attack defends himself

^{*} Cardozo Professor of Jurisprudence, Columbia Law School. This essay draws on and further elaborates upon the ideas first espoused in George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1973).

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and kills the aggressor, should he be acquitted? Secondly, if a third party, a stranger, intervenes on behalf of the victim and kills the aggressor, should he be acquitted?

The answer to the first question is relatively easy: it is hard to see either the justice or efficacy of punishing someone who kills for the sake of self-preservation. The more difficult issue is whether third persons should be allowed to intervene without risking criminal conviction. If one party to the affray must die, either the insane aggressor or his victim, why should an outsider be encouraged to take sides? Neither is morally at fault; neither deserves to die. Yet it is hard to deny the pull in the direction of favoring the victim of the attack and permitting intervention to restrain and disable the aggressor.

II. FIVE FAILED APPROACHES

A. Necessity as an Excuse

It is easy to solve the first-person case as a matter of necessity as an excuse. The claim would be that even though killing the insane aggressor is wrong, it is the natural expression of the human instinct for survival. The claim seems sound; no one can be blamed for killing to save his own life.

The problem with this approach is that it fails to account for our intuition that if a third party stranger had to choose between you and the aggressor, he would be right and proper in favoring you, the innocent victim facing death, over the aggressor endangering your life. Reducing the victim's claim to the level of an excuse is to concede that killing the psychotic aggressor is wrong. If killing the aggressor is wrong, why should anyone have a right to voluntarily intervene on behalf of the victim of the attack? An excuse of necessity in such cases would be limited to parties who stand in a close relationship with the person being attacked.

These implications conflict with our sense of justice in the situation. If there is anyone who should be assisted it is the party struggling to save his life against the psychotic aggressor, not *vice versa*. These counterintuitive results derive from conceding that resisting the psychotic aggressor is wrongful though excusable. An adequate theory, one that would permit third parties to intervene against (and not for) the psychotic aggressor, would have to hold that resistance was not merely excusable but indeed justifiable.

B. Self-Defense as an Excuse

Larry Alexander has argued that “when the aggressor is morally innocent, then self-defense, if it exonerates, cannot always be treated as a matter of justification.”¹ Thus, he contends that an “attack by innocent aggressors is better characterized as a case of duress that excuses homicide, not a case of Wrong that justifies it.”² Alexander’s view is driven by his belief that there are no morally relevant reasons that should lead us to assume that the interest in survival of the defending party outweighs the interest in survival of the insane aggressor.

Insofar as Alexander’s solution is premised on excusing the killing of the psychotic aggressor, it gives rise to the same counterintuitive results that were discussed in the previous section. Furthermore, by focusing on the relatively narrow question of whether the interests of one party outweigh the interests of the other, Alexander fails to acknowledge one very important feature of the case: that the victim of the psychotic

¹ Laurence Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1187 (1987)

² *Id.*

aggressor's attack does not lose his right to be free from unwarranted invasions of his living space merely because his assailant is insane. The focus should be on examining the comparative *rights* of the parties, not on undertaking a balancing of their relative interests in survival.

In a sense, it is unfortunate that the psychotic aggressor has to suffer an invasion of his sphere of autonomy so that the victim can vindicate her rights. Insane assailants are, after all, innocent aggressors. However, it would be much more unfortunate if the law were to adopt Alexander's view and tell the victim that she cannot lawfully defend herself from an insane assailant's unjustified attack. No one has a duty to capitulate to wrongful aggression.

C. Necessity as a Justification

Although excusing the killing of the psychotic aggressor leads to counterintuitive results, perhaps we can avoid such implications by *justifying* his killing under a theory of necessity. The problem with this approach is that one would have to find that taking the life of the psychotic aggressor constituted the "lesser evil" under the circumstances. Yet the most that can be gained from the killing is the saving of one's life. If it is life against life, it is hard to see why we should say that it is justifiable for one person to live and the other to die.

The fact is that in the case of the psychotic aggressor, we are inclined to favor an acquittal even if the loss to the aggressor is greater than the gain to the defendant. Indeed, as the problem is stated, that is the case. For all the defending party knows is that

there is a possibility of death if he does not resist. To fend off this possibility, he chooses certain death for the aggressor. When relevant probabilities are included in assessing the competing interests, it is clear the defendant engages in conduct with a higher expected loss (certain death) than expected gain (a probability of death). We could decrease the threat to the defendant without altering our intuitive judgment about the desirability of an acquittal. Would it make any difference if the defendant were threatened with loss of limb, rape or castration? One would think not. As the problem is treated in the literature, it is assumed that justice would require acquittal in these cases as well.

Perhaps those that look at the problem as one of justifiable necessity think that the life of the insane aggressor is worth less than the life of the defendant who is standing his ground. One finds analogies between psychotic aggressors and attacks by wild animals. If one thinks of the psychotic aggressor as subhuman, one might be able to justify the defensive killing as an act preserving the greater value. This is an intriguing if startling approach, but one that is apparently inadequate. Among its other defects it fails to account for the case of temporary psychosis. If the aggressor is a brilliant but temporarily deranged scientist, it would seem rather odd to say that his life is worth less than that of his victim, who for all we know might be a social pariah.

D. Interest Balancing Approaches to Justifiable Self-Defense

One could be tempted to adopt an interest balancing approach to self-defense that justifies conduct when the interest preserved by the defensive action outweighs the interest harmed. As such, it constitutes a variation on the choice of evils defense. This

approach is well-equipped to explain the justifiable nature of standard cases of self-defense in which the aggressor acts culpably. In such instances, the culpability of the aggressor is used as a rationale for diminishing the interests of the assailant relative to those of the victim. By depreciating the culpable aggressor's interest in the balancing process, it is possible to justify the use of defensive force even when the physical harm averted by the victim is of equal value to the one visited upon the aggressor.

Yet with culpability as its pinion, the interest balancing approach to self-defense cannot solve the problem of the psychotic aggressor. By definition the psychotic aggressor is not culpable and thus this conception of self-defense fails to explain why his interests should be worth less than those of the victim.

E. Passive Necessity as a Justification

Continental scholars have increasingly turned to passive necessity whenever their traditional theories of choice of evils and self-defense fail to justify conduct that they believe ought to be considered lawful. The claim of passive necessity, which has yet to find legislative or scholarly support in common law jurisdictions, justifies conduct that is aimed at neutralizing the source of the threat as long as the harm caused is not disproportional to the harm averted. The defense is confined to cases that do not qualify for justification under a theory of self-defense.

Recently, Mordechai Kremnitzer and Khalid Ghanayim argued that self-defense should justify the use of force only when it is necessary to repel a wrongful *and* culpable

aggression.³ They did so by defending an interest balancing approach to self-defense akin to the one described in the previous section. The novelty of their argument, however, lies in their contention that wrongful but nonculpable threats should trigger a right to use justifiable force pursuant to a claim of *passive necessity* rather than self-defense.

The gist of the proposal consists in adopting a theory of necessity that attaches considerable weight to determining which of the conflicting parties is the source of the threatened harm. This consideration proves decisive in the case of the psychotic aggressor. Although the harm inflicted by killing the insane assailant (death) is equal or greater to the concrete harm averted by the victim (serious bodily injury or death), the fact that the psychotic aggressor was the source of the threat tips the balance in favor of the victim.

The rationale underlying this proposal appears to be that mere aggression, regardless of whether it is unjustifiable or culpable, provides a basis for diminishing the interests of the assailant in the balancing process. Yet this argument does not survive critical examination. Why should someone's interest be diminished by virtue of conduct that cannot be characterized as either wrongful or culpable? One can understand diminishing an aggressor's interests if he acts wrongfully or if he is to blame for the encounter, but it is hard to see why he should be worth less merely because his body is the *locus* of the threat. Ultimately, this argument places too much emphasis on motion and non-motion. Without consideration of whether the actor's conduct is wrongful or blameworthy, the mere fact that one party's body is moving towards the body of another seems to be a morally irrelevant feature of the conflict.

³ Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875 (2005)

III. AN AUTONOMY-BASED THEORY OF SELF-DEFENSE AS A JUSTIFICATION

What is it about the aggression that prompts us to think that the victim and the third person ought to be able to kill the psychotic aggressor? The underlying judgment must be that the victim has a right to the integrity and autonomy of his body and that he has a right to prevent encroachments upon his living space. Respect for another person's autonomy is one of the foundational principles of our society. In each and every one of our interactions with another human being we are under a duty to not interfere with their autonomy. The duty, of course, is reciprocal, for others are also under a duty to respect our freedom.

The notions of individual freedom and the right to protect autonomy underlie a theory of self-defense that is not grounded on the balancing of interests. According to this theory, the crux of the aggressor's attack is that it unjustifiably threatens to encroach upon the victim's autonomy. Since an aggressor who engages in an unjustified attack has breached his duty to respect the rights of the victim, the victim's reciprocal duty to respect the aggressor's rights wanes. Thus, insofar as the aggressor unjustifiably impinges upon the victim's autonomy, the victim is no longer required to abstain from interfering with the assailant's liberty and is entitled to use whatever force is necessary to repel the attack. It is assumed that the innocent defender has a right to prevent any unwarranted encroachment upon his personal space. As German scholars have put it, the Right should never yield to the wrong.⁴

⁴ It is generally held that the phrase first appeared in U.F. Berner, *Die Notwehrtheorie*, ARCHIV DES CRIMINALRECHTS 546, 557, 562 (1848), though the maxim derives straight from the conceptual framework of Kant's theory of law. See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987).

This theory provides a vehicle with which to clearly distinguish between the justifications of self-defense and necessity. Whereas in cases of self-defense the conduct that threatens to impinge on the victim's freedom amounts to a breach of a duty to respect the victim's rights, in cases of justifiable necessity it does not. Thus, the person acting under necessity is still required to fully respect the rights of the person who is the source of the threat. Since none of the parties in a conflict that gives rise to a situation of necessity has infringed their duty to respect the other's rights, there is no reason to afford less protection to the autonomy of the actor whose conduct originated the threat. As a result, justification in cases of necessity can only follow when the good achieved by interfering with the autonomy of one of the parties outweighs the harm caused by doing so. The situation is different in cases of self-defense. Given that the aggressor has breached his duty to respect the autonomy of the defending party, the attack may be repelled even when doing so entails causing more harm than the one averted (e.g. the victim may kill the aggressor in order to avoid serious bodily injury or rape).

This approach to self-defense is espoused by many German, Spanish and Soviet criminal theorists. It also found expression in the early common law. Sir Edward Coke insisted that no "man shall (ever) give way to a thief, etc., neither shall he forfeit anything."⁵ John Locke supported the same theory of an absolute right to protect one's liberty and rights from encroachment by aggressors.⁶ Among the various accounts of this version of the self-defense, one finds the common theme that the act of aggression puts the aggressor outside the protection of the law. Locke, for example, speaks of the

⁵ EDWARD COKE, *THE THIRD INSTITUTE OF THE LAWS OF ENGLAND* 55 (1642)

⁶ JOHN LOCKE, *TWO TREATISES ON CIVIL GOVERNMENT* 120-27 (1690).

aggressor's being in a "state of war" with the defender.⁷ The argument is that the aggression breaches an implicit contract among autonomous agents, according to which each person or is bound to respect the living space of all others. The unwarranted intrusion upon someone's living space itself triggers a justified response.⁸

Only aggressions that amount to a breach of a duty to respect the victim's autonomy should trigger the right to use force in self-defense. This is the gist of the Model Penal Code's §3.04 requirement that self-defense only be exerted in response to the use of "unlawful force" against the victim's person. According to the Code, force employed against another person is unlawful if it is constitutive of an "offense" or an "actionable tort". The requirement is sensible, for only conduct that is against the criminal or civil law amounts to a breach of a legal duty to respect the rights of others. We find the same requirement in continental criminal codes, which condition the use of force in self-defense upon the existence of a "wrongful" (*rechtswidrig* in Germany, *ilegítima* in Spain) aggression. The rationale for this proviso is clear. The wrongful invasion of the defending party's vital interests authorizes him to temporarily neglect his duty to respect the autonomy of the aggressor to the extent that doing so is necessary to ward off the threat.

It should be noted, however, that some threats that interfere with another person's autonomy do not trigger a right to use force in self-defense. This is most obviously the case when someone interferes with another person's freedom as a result of a justified course of action. Take, for example, the case of a police officer who is effectuating a lawful arrest. Even though the conduct certainly impinges upon the freedom of the

⁷ *Id.* at 126.

⁸ The same doctrine finds expression in the rhetoric of the American Revolution. The slogan "Don't tread on me" expresses the claim that treading on someone else in itself entails a justified response.

arrestee, it would be mistaken to claim that the officer has violated his duty to respect the rights others. Given that the officer's aggression is justified, the arrestee has an obligation to tolerate the interference with their liberty.

Aggressions that lack human agency constitute another example of non-wrongful attacks that should not justify using force in self-defense. Causal processes that are not the product of human will are akin to natural events, even if they originate within the confines of a human body. Therefore, claiming that acts not reflective of human agency are wrongful is as erroneous as asserting that a threat that originates in a natural event amounts to unlawful force. If there is no "act," there can be no wrongful attack.

On the other hand, excused aggression qualifies as a wrongful attack that gives rise to a claim of self-defense. We ought to be able to demand that others abide by their duty to respect our autonomy regardless of their personal limitations and mental conditions. Our legal system reflects this. As a perfunctory examination of the tort law demonstrates, the mentally ill are under a duty to respect the rights of others in much the same way as sane people are. There are good reasons for this to be the case. Our right to be free from unlawful interferences with our person should not be compromised merely because the threat to our autonomy originates in the acts of an inculpable person. The defender does not have to pull his punches merely because the aggressor is mentally ill. In such a confrontation on the street, the aggressor loses the protections that he would get during a trial, that is, the right to plead excuses such as insanity or duress.

IV. Conclusion

Once we recognize that even a psychotic aggressor is under a duty to respect the autonomy of others, one can see why his aggression can be justifiably warded off in self-defense. In light of the wrongful nature of the attack, the victim's reciprocal obligation to show consideration for the psychotic aggressor's autonomy weakens. As a result, the law affords him a right to use whatever force is necessary to repel the unlawful aggression.

The fact that the psychotic actor would be acquitted on grounds of insanity if he were tried for his aggression is beside the point, for excuses such as insanity do not negate the wrongfulness of the act. Ultimately, the roots of the right to use defensive force are not in the culpability of the aggressor, but in the unjustifiable invasion of the autonomy of the defender. Furthermore, given that the victim's use of force against the psychotic aggressor is justifiable rather than merely excusable, third party intervention on behalf of the victim of the attack should be considered lawful as well.